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No. 92-205

In the Supreme Court of the United States

OCTOBER TERM, 1992

FREDERICK A. GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in addition to instructing the jury that it must find that petitioner acted knowingly and willfully in order to convict, the district court was required to give petitioner's requested instruction that good faith is a defense to the charges against him.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-28a, is reported at 961 F.2d 1097. The memorandum opinion of the district court, Pet. App. 29a-43a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1992. A petition for rehearing was denied on May 19, 1992. Pet. App. 45a. The petition for a writ of certiorari was filed on July 31, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to violate the securities laws, in violation of 18 U.S.C. 371, and two counts of making false statements in filings with the Securities and Exchange Commission (SEC), in violation of 15 U.S.C. 78ff(a). Petitioner was sentenced to two years' imprisonment and a $100,000 fine on the conspiracy count, to be followed by two years' probation on the false statement counts. The court of appeals affirmed.

1. Petitioner was the co-founder and chief executive officer of Systems and Computer Technology Corporation (SCT), a company that provided computer services to a number of colleges and universities. Petitioner's co-defendant, William Searcy, was the company's vice president and one of its directors. The evidence showed that petitioner and Searcy conspired to inflate artificially the income recognition of SCT in order to enhance the value of the company's publicly traded stock. Pet. App. 3a-4a.

In early 1984, petitioner directed employees of SCT to issue so-called "out letters" to individuals who had signed or might sign contracts for the provision of goods and services by SCT. These letters gave clients the option of escaping from their contracts with SCT, although the terms of the contracts did not provide for such cancellation. The company's revenue reports were prepared by individuals relying on the contracts alone without knowledge of the "out letters," and those individuals treated the contracts as binding. As a result, the revenues reported in the company's revenue reports were inflated. Pet. App. 4a.

Petitioner's deception caused false statements about the company's revenues to be included in filings with the SEC for the second and third quarters of 1984. The

scheme was first exposed when the auditors for SCT uncovered one of the "out letters." Further investigation disclosed the rest of the deceptive scheme. Pet. App. 4a.

2. The district court instructed the jury that to convict petitioner on the conspiracy and false statement charges it must find that he acted "knowingly" and "willfully." Pet. App. 10a-11a. With respect to the conspiracy count, the jury was instructed that

> [b]efore you may find that a defendant has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.
>
> To act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done. That is to say, to act or to participate with a bad purpose either to disobey or disregard the law.

Id. at 10a. The court also instructed the jury that

> [a]n act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to insure that no one will be convicted for an act done because of mistake or accident or other innocent reason.

Id. at 39a. With respect to the false statement counts, the jury was instructed that

> you must find that the defendant knew the statement made or caused to be made was false. An act is done knowingly if done voluntarily and intentionally. The

> defendant must have been aware of what he was doing and what he was not doing.
>
> [Y]ou must find that if the defendant made or caused to be made a false statement he was acting willfully, that is deliberately or on purpose and not because of mistake, inadvertence or accident.

Id. at 10a-11a.

Petitioner requested that the court also give the following instruction on good faith:

> Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud.
>
> A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.
>
> Even false representations or statements or omissions of material facts do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be.

Pet. App. 5a. The district court declined to give that instruction with respect to petitioner. The court also declined to give it with respect to co-defendant Searcy on the counts in which both Searcy and petitioner were charged. The court, however, did give the good faith instruction with respect to the securities fraud and mail

fraud counts, in which Searcy was charged but petitioner was not. *Id.* at 5a, 13a.

3. The court of appeals affirmed, rejecting petitioner's contention that the district court abused its discretion by not giving his good faith instruction. Pet. App. 9a-12a. Agreeing with the majority of the courts of appeals that have considered the question, the court explained that petitioner's requested instruction was "merely surplusage" since it was "simply a reiteration that the government must carry its burden in demonstrating that the accused acted knowingly and willfully, because a jury finding that the defendant has acted knowingly and willfully is inconsistent with a finding that the defendant acted in good faith." *Id.* at 11a-12a. The court observed that "[b]y giving a detailed instruction on the elements of the crime with which [petitioner] was charged, the court ensured that a jury finding of good faith would lead to an acquittal." *Id.* at 12a. Evaluating the jury instructions as a whole, the court concluded that "the district court's charge was within the bounds of its discretion." *Ibid.*

The court of appeals also rejected petitioner's alternative claim that it was error not to give the good faith instruction on the counts against him because the court gave that instruction on counts charging different offenses against Searcy. Pet. App. 13a. The court determined that "the jury was not misled," because Searcy did not receive the good faith charge on the counts against both Searcy and petitioner. Accordingly, the court agreed with the government's argument that "no negative implication could have arisen when neither defendant received the good faith instruction on the crimes with which both defendants were charged." *Ibid.*[1]

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[1] The court of appeals also rejected petitioner's claim that the government failed to disclose some material covered by the Jencks

ARGUMENT

Petitioner contends (Pet. 8-21) that the district court erred in failing to give a separate good faith instruction to the jury and that this Court should grant review to resolve a conflict in the circuits on the question whether such an instruction is required. The court of appeals correctly held that no such instruction is required, and the claimed circuit conflict does not warrant this Court's review.

1. A defendant is entitled to an instruction on his theory of defense if he makes a timely request for the instruction, the evidence supports the instruction, and the instruction correctly states the law. See *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). But a defendant is not entitled to have the jury instructed in his particular words; it is sufficient if the instructions given adequately and correctly cover the substance of the requested instruction. It is thus well settled that the adequacy of the instructions must be evaluated in the context of the charge as a whole. See *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 (1991); *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

Petitioner contends that, although the jury was instructed adequately and correctly on the requirement that the government establish that he committed his offenses knowingly and willfully, the district court nevertheless erred by failing to include his separate instruction that good faith is a defense to the crimes charged. Although we agree that good faith is a defense, the instructions that the court gave adequately informed the

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Act, 18 U.S.C. 3500, Pet. App. 14a-19a, and his claim that the district court had impermissibly relied on certain information in determining petitioner's sentence, *id.* at 24a-27a. Petitioner does not renew those claims here.

jury of that defense, and the district court did not err in refusing petitioner's proposed good faith instruction.

This case is controlled by *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam). In *Pomponio*, the defendants were charged with willfully filing false income tax returns, in violation of 26 U.S.C. 7206(1), by causing corporations they controlled to report certain payments as loans when they knew the payments were really taxable dividends, and by claiming partnership losses as deductions when they knew the losses were properly attributable to a corporation. 429 U.S. at 10-11. On appeal, the defendants claimed that the district court "erred in refusing to give a requested instruction on good faith belief of the defendants as to the nature of the loans especially and the deductibility of the partners[']losses." *United States* v. *Pomponio*, 528 F.2d 247, 248 (4th Cir. 1975).

The court of appeals accepted that claim. It noted that the trial court gave "full and complete" instructions that the jury should convict only if it found that the defendants signed their tax returns knowing them to be false. 528 F.2d at 249. It nevertheless held that "[s]ince a good faith belief would tend to negate the elements of willfulness and knowledge, [the defendants] were entitled to [such] an instruction * * *." *Id.* at 250.

This Court reversed the judgment of the court of appeals, holding that, because the trial judge had "adequately instructed the jury on willfulness, * * * [a]n additional instruction on good faith was unnecessary." 429 U.S. at 13.[2] See also *Cheek* v. *United States*,

[2] The Court also rejected the court of appeals' holding that it was improper to instruct the jury that "[g]ood motive alone is never a defense where the act done or omitted is a crime." 429 U.S. at 11. The Court explained that the term "willfully" connotes "an intentional violation of a known legal duty," and does not require proof of any other motive. *Id.* at 12.

111 S. Ct. 604, 610 (1991) (noting the Court's holding in *Pomponio* that "after instructing the jury on willfulness, an additional instruction on good faith was unnecessary").[3]

In petitioner's case, the jury was instructed that it must find beyond a reasonable doubt that petitioner "willfully participated" in the conspiracy. The court then explained that "[t]o act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done. That is to say, to act or to participate with a bad purpose either to disobey or disregard the law." The court also instructed, on the false statement counts, that the jury must find that petitioner "knew the statement made or caused to be made was false," and that he "made or caused to be made a false statement * * * willfully, that is deliberately or on purpose and not because of mistake, inadvertence or accident." Pet. App. 10a-11a, 39a. Those instructions are essentially identical in all relevant respects to the instructions that were found sufficient in *United States* v. *Pomponio*.[4] Accord-

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[3] In *Cheek* v. *United States*, 111 S. Ct. at 611, this Court held that, in a tax evasion case, it is error to say that "a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue." *Cheek*'s holding that a jury should not be instructed that a defendant's belief must be objectively reasonable does not undercut or diminish the holding of *Pomponio* that the standard instructions on knowledge and willfulness are adequate to present the good faith defense to the jury.

[4] In that case, the Court noted that the jury was instructed that "[a] willful act" is "one done 'voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law.'" *Pomponio*, 429 U.S. at 11; see also *id.* at 11 n.2.

ingly, as in *Pomponio*, "[a]n additional instruction on good faith was unnecessary." 429 U.S. at 13.

As the court of appeals explained, the jury's conviction under the instructions given is inconsistent with a finding that petitioner acted in good faith. The required finding of knowledge and bad purpose negated petitioner's claim of good faith. Although petitioner argues that his proposed instruction was necessary "to focus the jury's attention on the essential issues in the case and to inform the jury of the permissible ways in which the issues may be resolved," Pet. 18, the instructions given adequately fulfilled that objective. To the extent petitioner's proposed instruction sought to focus the jury on the requirement that petitioner could not be convicted if he had "[a]n honest belief in the truth of the representations" in the SEC filings, Pet. App. 5a, the actual instructions directed attention to that issue by requiring a finding that petitioner knew the statements were false and deliberately or purposefully intended to make the false statements.

Indeed, petitioner's proposed instruction was misleading in a significant respect. His proposed instruction stated that "an essential element of the crime charged is intent to defraud" and sought to point out that a plan "is not fraudulent if it was devised or carried out in good faith." Pet. App. 5a. But an "intent to defraud" is not an element of the substantive false statement offense of which petitioner was twice convicted, nor an element of the charge of conspiracy to commit that substantive offense, which was one of the objects of the conspiracy. *Id.* at 43a. Petitioner's proposed charge would have inaccurately told the jury that intent to defraud was an element of those offenses. The misleading nature of petitioner's proposed charge provides an independent ground for upholding the district court's rejection of it.

2. Petitioner acknowledges (Pet. 11-12) that the decision of the Third Circuit in this case agrees with the majority of the courts of appeals that have addressed the question of the adequacy of standard instructions on knowledge and willfulness to present the good faith defense. See, *e.g.*, *United States* v. *Dockray*, 943 F.2d 152, 154-155 (1st Cir. 1991); *United States* v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990); *United States* v. *Rochester*, 898 F.2d 971, 979 (5th Cir. 1990); *United States* v. *Alcantar*, 832 F.2d 1175, 1179 (9th Cir. 1987); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981). He contends (Pet. 13-14), however, that review is warranted because in *United States* v. *Casperson*, 773 F.2d 216, 223-224 (8th Cir. 1985), and *United States* v. *Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc), the courts held that, even if the jury is instructed on willfulness and specific intent, an additional good faith instruction is required in cases in which the evidence supports the instruction.

Although we believe that *Casperson* and *Hopkins* were wrongly decided, there is no need for this Court to grant review in this case to resolve any disagreement among the courts of appeals. As the First Circuit observed in *United States* v. *Dockray*, 943 F.2d at 155, "[i]f there is a discernible trend on this issue, it seems to be moving against" the requirement of a separate instruction on good faith. In the years since the decisions in *Casperson* and *Hopkins*, the Fifth Circuit has abandoned its earlier ruling in *United States* v. *Goss*, 650 F.2d 1336 (1981), that a separate good faith instruction is required. See *United States* v. *Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986); *United States* v. *Rochester*, *supra*. Moreover, the First and Third Circuits have joined the other circuits that hold that when the jury is correctly instructed on willfulness and knowledge, a separate instruction on good faith is not required. See *United States* v. *Dockray*, *supra*; Pet. App. 12a.

In addition, neither the Eighth Circuit nor the Tenth Circuit has extended its requirement of a separate good faith instruction to offenses involving the making of a false statement.[5] Since its decision in *Casperson*, the Eighth Circuit has held repeatedly in cases involving false statement offenses that the standard instructions on knowledge and willfulness adequately present the good faith defense. See *United States* v. *Hildebrandt*, 961 F.2d 116, 118-119 (1992) (false statement in filing with IRS, 18 U.S.C. 1001), petition for cert. pending, No. 92-5090 (filed July 2, 1992); *United States* v. *Cegelka*, 853 F.2d 627, 628-629 (1988) (false statement in Medicare forms, 42 U.S.C. 1395nn(a)(1)), cert. denied, 488 U.S. 1011 (1989); *United States* v. *Sanders*, 834 F.2d 717, 719 (1987) (false statement to government agency, 18 U.S.C. 1001, and criminal conversion, 18 U.S.C. 658). Accordingly, there is no square conflict between the Eighth Circuit cases and the decision in this case.

Nor is there a square conflict with any Tenth Circuit decision. The Tenth Circuit's holding in *Hopkins* was limited to mail fraud and wire fraud offenses. See 744

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[5] It is unnecessary to consider the adequacy of the instructions with respect to any other offense in this case. Petitioner was convicted on two counts of making or causing to be made false statements in SEC filings, and one count of conspiracy to commit securities fraud or to make or cause to be made false statements in SEC filings. Pet. App. 42a n.10. As the district court stated, however, the jury's verdict on the conspiracy count "can be sustained solely on the basis" of the jury's conclusion that petitioner conspired to make false statements, and "[t]he special verdicts returned by the jury demonstrate that the jury unanimously agreed that [petitioner] conspired to violate 15 U.S.C. § 78ff(a) by making false and misleading statements in SCT's quarterly reports." *Id.* at 43a. Accordingly, although the court of appeals wrote its opinion more broadly, the judgment in this case does not depend on whether the jury was properly instructed as to the securities fraud object of the conspiracy.

F.2d at 718 ("Our holding as to the need for a good faith instruction * * * is intended to apply to both substantive and conspiracy counts for mail or wire fraud."). The Tenth Circuit has since stated its rule regarding the need for a good faith instruction in unqualified terms, and has extended it to a variety of other offenses. See *United States* v. *Haddock*, 956 F.2d 1534, 1547 (1992) (bank fraud, 18 U.S.C. 1344); *United States* v. *Mann*, 884 F.2d 532, 536-537 (1989) (willful failure to file tax return, 26 U.S.C. 7203); *United States* v. *Harting*, 879 F.2d 765, 767 (1989) (same); *United States* v. *Harrold*, 796 F.2d 1275, 1283 (1986) (tax evasion, 26 U.S.C. 7201), cert. denied, 479 U.S. 1037 (1987). We are unaware, however, of any decision applying it to a false statement offense. Thus, while we disagree with the Tenth Circuit's rule on its own terms, that court has not applied its rule so as to raise a square conflict with this case.

In any event, the issue that divides the courts of appeals does not have sufficient importance in the administration of federal criminal trials to warrant review by this Court. All courts of appeals are in accord with the underlying principle that the instructions, considered as a whole, must be adequate to present the good faith defense to the jury and fairly guide the jury to acquit if it believes the defense. The difference of opinion is over whether, for some offenses, a separate good faith instruction is required, above and beyond instructions that the defendant must act knowingly and willfully. From this Court's decision in *United States* v. *Pomponio*, *supra*, we submit that the answer is clear that no separate instruction is required. But the existence of a different rule in some circuits, requiring the instruction to be given, is not as a general matter harmful or burden-

some to the jury, the government, or the courts.[6] Thus, while we believe that a separate good faith instruction is unnecessary, this Court's review is not required to enforce uniformity of practice on that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1992

[6] Nor would it be harmful if district courts were to follow the court of appeals' admonition that "[w]hile it was not reversible error for the district court to refuse to give the good faith instruction in this case, we commend to the district judges in the exercise of their discretion its use as a supplement to the 'knowing and willful' charge in future cases." Pet. App. 12a.